Bedtime for Doctor *O'Brien*

By Walter F. Bottger

The old saw, "hard cases make bad law," perhaps has no better illustration than the aging but still troublesome case of *O'Brien v. O'Brien*.[1] It may be time to put *O'Brien* to bed.

As everyone by now knows, Dr. Michael O'Brien obtained his medical degree and license during his marriage. During that time, his wife contributed significantly to her husband's support and educational efforts and endured her own career sacrifices for his benefit. Once he had his license, but before he had begun to earn significantly or accumulate assets, the new Doctor O'Brien commenced a divorce action against his wife.

Faced with a set of facts brimming with inequity and unable to offer compensation to the wife with existing assets or income, the Court of Appeals took a metaphysical leap of faith and "discovered" distributable property in the intangible essence of Dr. O'Brien's medical license. With that, the Court of Appeals started New York law down a confusing, often problematic and inequitable path.

Still in the developmental stages after the 1980 enactment of equitable distribution, New York apparently thought itself in the vanguard by creating property out of a license to practice. But, as Judge Robert Smith pointed out in his dissent in the more recent case of *Holterman v. Holterman*,[2] "[i]n 19 years, not one other state has adopted the *O'Brien*[3] rule...." Instead, New York is now more like the old duffer driving the wrong way on the Interstate whose wife calls him on his cell phone to warn him about a driver going the wrong way on the Interstate. "Hell," the oldster responded, "they're all going the wrong way."

Attorneys and courts can point to a few applications of the *O'Brien* rule where, as in the original, justice has been served by valuing an intangible as property in order to compensate a spouse who would otherwise be shortchanged. But more often, it seems, courts have wandered in several directions as they struggled with the mandate that they create something out of nothing.

The gist of the *O'Brien* rule is that:

> [a] professional license is a valuable property right, reflected in the money, effort and lost opportunity for employment expended in its acquisition, and also in the enhanced earning capacity it affords its holder....[4]

Once the Court of Appeals "discovered" property in a medical license, courts began scrambling to find property lurking in every form of intangible.

In *McGowan v. McGowan*,[5] a master's degree earned during the marriage but not connected to a license was found to be a marital asset to be distributed. A Fellowship in a Society of Actuaries was found to be marital property in *McAlpine v. McAlpine*.[6] In *Haspel v. Haspel*,[7] some securities licenses and a real estate broker's license (not the products of any significant schooling or efforts) which were obtained during the marriage were held to be distributable marital assets.[8] And one court found that a maritime apprenticeship during a marriage but not yet resulting in a license was a marital asset to be distributed.[9]

Courts have also searched outside the bounds of the marriage to find intangible property to pull into the marital pot. In *Madori v. Madori*,[10] a court said that emergency room experience which utilized a pre-marital medical degree comprised marital property. It treated the experience as though it were appreciation of separate property in the manner of *Price v. Price*.[11] And recently the Second Department approved applying an *O'Brien* valuation to a degree awarded after the marriage, where some of the course work for it was completed during the marriage.[12] To do this, the court adopted for intangibles the same method used in valuing bonuses or other tangible property earned during the marriage but received afterward.

The search for "property" has led courts down many exploratory paths, but none more problematic than that of *Golub v. Golub* in 1988.[13] In *Golub*, the New York County Supreme Court reified the celebrity status of a well-known model and actress.

"There seems to be no rational basis upon which to distinguish between a degree, a license, or any other special skill that generates substantial income," said the court.[14] But in its effort to expand the definition of intangible property, the *Golub* court overlooked the connection in *O'Brien* between the license and its resulting enhancement of the holder's earnings. As one court put it clearly: "The value of such assets is reflected in the *enhanced earning capacity* that they afford the holder...."[15] There was in *Golub* no clear connection between the fact of the wife's celebrity and how it had enhanced any earnings that were not there before.

Nevertheless, the *Golub* decision inspired courts with a new burst of property hunting. The Appellate Division, First Department, found *O'Brien* property in an opera singer's career, also ignoring the connection between the "property" and any enhanced earnings.[16] Later, the First Department discovered property in a successful investment banker's career, unconnected to any degree or license.[17] In a model of circuitous logic, the court said, in essence, that the husband's successful career had enhanced his successful career.

Flush with these exercises in mental gymnastics, one court found distributable value in a salesman's efforts and

ability as reflected in his "book of business," although the "book of business" belonged to his employer and not to him.[18] That court approvingly noted the earlier cases and the expanding nature of property they represented and thus had no trouble finding that the husband's hard work and salesmanship constituted a distributable marital asset.[19]

One court used imputed income, usually reserved for determining of child or spousal support, to expand the intangible marital property.[20] Confronted with an underused registered nurse's license, the court increased its value by assuming higher statistical earnings, although the license had not, in fact, enhanced the holder's earnings to that level.

The search for property in intangible places is fraught with danger and potential injustice. For example, the *Hougie* court recognized a Series 7 license to be a marital asset under *O'Brien*.[21] A Series 7 certificate of registration is a permit required to sell stocks. It is obtained after a brief exam for which a few hours of study may be needed. Yet this briefly obtained certificate could, under *O'Brien*, be valued in the millions of dollars, if the receiver of the Series 7 then commits years of effort and skill and becomes a successful financier. Then, because of the Series 7 registration, the titled spouse could be stuck with a multi-million-dollar unmodifiable liability, virtually enslaving him or her for the rest of his or her life.

Following the logic that led to *O'Brien* valuations of a Series 7, it would not be a long reach to find the certificate from a Continuing Legal Education presentation to be a marital asset subject to full *O'Brien* valuation. Or what about such required licenses as an electrician's or barber's license or even a driver's license used to get to work? Or why couldn't a court use the statistical earnings of a professional chef to value a spouse's certificate of attendance at a cooking class? There are few "personal enhancement" courses, such as photography, home decorating, pottery making or even investment advice, which do not offer certificates upon completion. All these could inspire an *O'Brien* evaluation. The possibilities are limited only by the imaginations and penchant for mischief of the lawyers and the courts involved.

A classic case threatening injustice is that of a young person who earns a valuable degree or license, such as an MBA or law license, during a short marriage. Given the long work life ahead, the degree or license would have a very high value, thus forcing the holder to spend much of his or her remaining work life paying off the distributive award. Such an award forces the degree holder to continue his or her present career, while the recipient spouse is free and financially enabled to do whatever he or she wishes.

Another lurking unfairness is the valuation of an unused degree. In one unreported case of which the writer is aware, a practicing physician obtained an MBA degree but never used it. Nevertheless, upon divorce, his MBA was valued statistically, looking to MBAs in the finance world in New York, even though to the holder, the degree had no value at all.

Another anomaly is the likelihood of disparate values assigned to the same degree or license, depending on the personal energy and effort of the more successful holder. This problem is especially evident when the evaluation uses a baseline of statistical earnings and a "top line" of historical earnings. Placing a higher value on the more successful person's degree or license is, in reality, the transmutation of individual effort and ability into a thing, not a personal quality.

Of course, lurking down the path after an *O'Brien* valuation is the possibility of a career or health disaster. An automobile accident could cut short a promising career. A financial crash such as the recent one could suddenly put a high earner on the street. Indeed, an increase in tax rates or even a failure by the titled spouse to achieve his or her hoped-for potential would defeat the assumptions underlying the distribution. With no chance that an award could be modified, regardless of the circumstances, the distribution would likely wreck the holder's entire life. Such problematic outcomes were anticipated by Judge Meyer in his concurring opinion in *O'Brien* itself,[22] but they seem not to have bothered courts until Judge Smith's dissent in *Holterman*.

Courts of other states have more readily recognized the dangers inherent in *O'Brien*. For example, a Massachusetts court said that:

> [t]o adopt a rule that would subject such an item [a license, degree, etc.] to distribution upon divorce would foreclose consideration of the effect of future events on the individual's earning capacity.[23]

Even before *O'Brien* it was recognized by the New Jersey Supreme Court in *Mahoney v. Mahoney* that:

> [e]quitable distribution of a professional degree would...require distribution of "earning capacity"—income that the degree holder might never acquire. The amount of future earnings would be entirely speculative.[24]

Quoting *Mahoney*, a Colorado court said:

> Valuing a professional degree in the hands of a particular individual at the start of his or her career would involve a gamut of calculations that reduces to little more than guesswork.[25]

Built into the *O'Brien* process are also certain mechanical problems with which courts have to struggle. How to pick a proper baseline for earnings can cause disparities. For example, why should a highly compensated attorney

whose significant efforts resulted in a large income have, as a baseline, the average earnings of the holder of a bachelor's degree? If that person had not gone to law school, it is more likely than not that he or she would have earned much more than the statistical average.

Top lines can also be problematic. If a person obtained a certain degree or license twenty years before his divorce, why should a few years of his recent highest earnings establish the value of the degree or license? Or why should any imputed (and thus unenhanced) earnings, even if statistically based, be included in the top line? And shouldn't fairness require consideration of the fact that, several years after a degree or license was earned and exploited, both the non-titled and titled spouse have enjoyed its benefits, and that a subsequent award based on its full statistical value would amount to a windfall to the non-titled spouse? Or looked at like tangible property, hasn't the value of the asset depreciated?

As to discount rates, they are hard enough to establish with regard to physical assets such as retirement funds or investments. Why should courts have to struggle applying future value, mortality or other discount rates to assets which are themselves the product of mental holography?

There is, to some extent, a recognition by courts of the difficulties imposed on our jurisprudence by *O'Brien*, and attempts by those courts to limit the damage. Courts, for example, have reduced valuations by applying coverture fractions to the process of obtaining the degree or license, thus reducing the value.[26] Some courts have declined to value as marital any efforts or achievements during the marriage where the degree or license was received either before or after it.[27] The Fourth Department refused to value a banking career as a marital asset in the absence of proof that an undergraduate degree and attendance at business school classes actually enhanced the career.[28] And in a thoughtful and challenging opinion, Justice Laura Drager of the New York County Supreme Court declined to treat a successful financial career, including the acquisition of one of the required securities licenses, as a marital asset."[29] [A]lthough the husband's earnings increased substantially during the marriage," the court said, "his career progression does not constitute marital property."[30]

The most common limitation of *O'Brien* arises from scrutiny of the respective contributions of the spouses to the item in question. Several courts have found that the non-titled spouse had not shown sufficient contributions or sacrifices relating to the "asset" to merit an equal or, in some cases, any distribution of the value.[31]

All of these attempts to mitigate the effect of *O'Brien*, however, constitute little more than taking aspirin for cancer. Why should courts have to seek palliatives to avoid the injustice inherent in a flawed doctrine? The fundamental problem is not how to avoid the potential injustice of *O'Brien*. The fundamental problem is the continued existence of *O'Brien*.

The *O'Brien* rule frequently forces courts to struggle with conceptually illusive and challenging concepts.

Its implementation necessitates expensive experts, hours or even days of court time, and a concomitant significant increase in litigation costs. The results often punish the effort and ability of the titled spouse and infringe on his or her future freedom. In too many cases, the *O'Brien* rule results in an unfair outcome, overvaluing marital property and the ability of the titled spouse to pay. And, it should not be overlooked, the rule renders our own state's jurisprudence an anomaly in the federal system.

At its core, the *O'Brien* problem is a metaphysical one. The rule is ontologically unsound. It transmutes the abstruse into the tangible, making clumsy neo-Kantians out of matrimonial courts. It is like a dedicated idealist, insisting that air is solid, stepping off a cliff.

The ability to compensate the non-titled spouse for his or her part in the attainment of a license or degree would not be lost with the demise of *O'Brien*. The present law on maintenance and equitable distribution provides courts with sufficient means of effecting equity in the marital dissolution. The factors in both the maintenance and equitable distribution parts of Domestic Relations Law Section 236 give courts all the necessary latitude to address contributions or sacrifices by the non-titled spouse. If there is already a significant income stream and/or assets, they can form the basis of an appropriate maintenance award or unequal compensatory distribution of assets. If not, a simple change in the maintenance statute (see below) would suffice. And then, should there be a misjudgment by the awarding court, or a substantial change of circumstances later on, the potential resulting injustice could be corrected.

The courts of the other states have not had trouble taking a more direct approach. For example, in *Downs v. Downs*,[32] the Supreme Court of Vermont noted that "maintenance can be a tool to balance equities whenever the financial contributions of one spouse enable the other spouse to enhance his or her future earning capacity."[33] And the Colorado Supreme Court said that:

> [t]he contribution of one spouse to the education of the other spouse may be taken into consideration when marital property is divided...[and] [t]he trial court could make an award of maintenance based on all relevant factors including the contribution of one spouse to the education of the other spouse....[34]

Two objections to the maintenance approach have been raised. First is the fact that maintenance presently terminates upon the recipient spouse's remarriage.

As pointed out below, that problem can be dealt with legislatively.

The other problem is the concern that awarding maintenance rather than "property" fails to reflect the partnership aspect of marriage and, hence, may demean the recipient spouse. But this problem is one inherent, not in maintenance itself, but in the original choice of calling the post-divorce income flow "maintenance." Indeed, the word "maintenance" does imply a disparity of roles in the marriage. But the answer is not to wallow in the metaphysical swamp of *O'Brien*, but to change the word back to "alimony" or to something like "equitable income distribution."

How to effect the demise of *O'Brien* points to the legislature. Waiting for the Court of Appeals to do it seems fruitless. One only has to glance at the majority opinion in *Holterman v. Holterman*, *supra*, where the court rigidly stuck with *O'Brien* while reading the CSSA in such a way as to validate "double dipping."[35] It is clear that the Court of Appeals is firmly wedded to the *O'Brien* rule. The only hope is remedial legislation.

In a season when New York has finally emerged from the lonely cocoon of marital fault and joined the rest of the United States, it seems felicitous for the State to do the same with its other unique and problematic law. For example, our legislature might address the problem by adding at the end of DRL § 236-B(1)(c):

> Marital property shall also not include such personally held intangible assets as degrees, licenses, certificates, reputation, earning enhancements, or good will (unless attached to a tangible asset with market value).

To give courts more latitude in awarding maintenance in a situation such as *O'Brien*, DRL § 236-B(6)(c) could be amended to read:

> c. The court may award permanent maintenance, but an award of maintenance shall terminate upon the death of either party or, *unless the court orders otherwise upon stated reasons therefor,* upon the recipient's valid or invalid marriage....

Such a change would allow courts more latitude and security in awarding compensatory alimony.

In any case, the *O'Brien* rule has caused too many problems, too much injustice and wasted too much money. It is well past *O'Brien's* bedtime.

Endnotes

1. 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985).
2. 3 N.Y.3d 1, 814 N.E.2d 765, 781 N.Y.S.2d 458 (2004).
3. 3 N.Y.3d at 24, 814 N.E.2d at 780, 781 N.Y.S.2d at 473.
4. *O'Brien v. O'Brien*, 66 N.Y.2d at 586, 489 N.E.2d at 717, 498 N.Y.S.2d at 748.
5. 142 A.D.2d 355, 535 N.Y.S.2d 990 (2d Dept. 1988).
6. 176 A.D.2d 285, 574 N.Y.S.2d 385 (2d Dept. 1991).
7. 78 A.D.3d 887, 911 N.Y.S.2d 408 (2d Dept. 2010).
8. See also, *Schwartz v. Schwartz*, 67 A.D.3d 989, 890 N.Y.S.2d 71 (2d Dept. 2009) for a similar finding.
9. *Pino v. Pino*, 189 Misc.2d 331, 731 N.Y.S.2d 599 (Sup. Ct. Nassau Co. 2001).
10. 151 Misc.2d 737, 573 N.Y.S.2d 553 (Sup. Ct. Westchester Co. 1991).
11. 69 N.Y.2d 8, 503 N.E.2d 684, 511 N.Y.S.2d 219 (1986).
12. *Kuznetsov v. Kuznetsova,* 79 A.D.3d 974, 913 N.Y.S.2d 325 (2d Dept. 2010).
13. 139 Misc.2d 440, 527 N.Y.S.2d 946 (Sup. Ct. N.Y. Co. 1988).
14. 139 Misc.2d at 446, 527 N.Y.S.2d at 950.
15. *Finocchio v. Finocchio,* 162 A.D.2d 1044, 1045, 556 N.Y.S.2d 1007, 1009 (4th Dept. 1990) (emphasis supplied).
16. *Elkus v. Elkus*, 169 A.D.2d 134, 572 N.Y.S.2d 901 (1st Dept. 1991).
17. *Hougie v. Hougie*, 261 A.D.2d 161, 689 N.Y.S.2d 490 (1st Dept. 1999).
18. *Moll v. Moll*, 187 Misc.2d 770, 722 N.Y.S.2d 732 (Sup. Ct. Monroe Co. 2001).
19. 187 Misc.2d at 774-5, 722 N.Y.S.2d at 735.
20. *Spreitzer v. Spreitzer,* 40 A.D. 3d 840, 837 N.Y.S. 2d 658 (2d Dept. 2007).
21. *Hougie v. Hougie*, *supra*. Similarly such licenses were said to be subject to equitable distribution in *Haspel v. Haspel*, *supra* and *Schwartz v. Schwartz*, *supra.*
22. 66 N.Y.2d at 591, 489 N.E.2d at 720, 498 N.Y.S.2d at 751.
23. *Drapek v. Drapek*, 399 Mass. 240, 244, 503 N.E.2d 946, 949 (1987).
24. 91 N.J. 488, 497, 453 A.2d 527, 532 (Sup. Ct. N.J. 1982).
25. *Olar v. Olar*, 747 P.2d 676, 680 (Sup. Ct. Colorado 1987).
26. *See*, for example, *Gandhi v. Gandhi*, 283 A.D.2d 782, 724 N.Y.S.2d 541 (3d Dept. 2001); *Vora v. Vora*, 268 A.D.2d 470, 702 N.Y.S.2d 343 (2d Dept. 2000).
27. *See, Fruchter v. Fruchter*, 29 A.D.3d 942, 816 N.Y.S.2d 525 (2d Dept. 2006); *Spence v. Spence*, 287 A.D.2d 447, 731 N.Y.S.2d 66 (2d Dept. 2001); *Kyle v. Kyle*, 156 A.D.2d 508, 548 N.Y.S.2d 781 (2d Dept. 1989).
28. *West v. West*, 213 A.D.2d 1025, 625 N.Y.S.2d 116 (4th Dept. 1995).
29. *J.C. v. S.C.*, NYLJ, 10/31/2003, 20 (col. 1).
30. *Id*.
31. *See*, for example, *McAuliffe v. McAuliffe*, 70 A.D.3d 1129, 895 N.Y.S.2d 228 (3d Dept. 2010); *Kriftcher v. Kriftcher*, 59 A.D.3d 392, 874 N.Y.S.2d 153 (2d Dept. 2009); *Higgins v. Higgins*, 50 A.D.3d 852, 857 N.Y.S.2d 171 (2d Dept. 2008); *Martinson v. Martinson*, 32 A.D.3d 1276, 821 N.Y.S.2d 537 (4th Dept. 2006); *Cabeche v. Cebache*, 10 A.D.3d 441, 780 N.Y.S.2d 909 (2d Dept. 2004); *Miklos v. Miklos*, 9 A.D.3d 397, 780 N.Y.S.2d 622 (2d Dept. 2004); *Farrell v. Cleary-Farrell*, 306 A.D.2d 597, 761 N.Y.S.2d 357 (3d Dept. 2003); *Brough v. Brough*, 285 A.D.2d 913, 727 N.Y.S.2d 555 (3d Dept. 2001).
32. 154 Vt. 161, 574 A.2d 156 (Sup. Ct. Vermont 1990).
33. 154 Vt. at 166, 574 A.2d at 159.
34. *Olar v. Olar*, 747 P.2d at 680.
35. *See also, Keane v. Keane*, 8 N.Y.3d 115, 861 N.E.2d 98, 828 N.Y.S.2d 283 (2006), where the court made an untenable distinction while adamantly adhering to *O'Brien*.

Walter F. Bottger is a graduate of Harvard College and Columbia Law School. A partner at Berkman Bottger Newman & Rodd, LLP, he has practiced law actively in New York City for over forty years concentrating on matrimonial matters for the past twenty years.